No. 14-19-00969-cv

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

RUTH R. HUGHS, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF TEXAS,

Defendant-Appellant,

v.

NEAL DIKEMAN, SHAWN KELLY, ROY ERIKSEN, JARED WISSEL, SCOTT FORD, BILLY PIERCE, CHRISTINA FORD, CHARLIE STEVENS, and NEKO ANTONIOU,

Plaintiffs-Appellees,

On Appeal from the
11th Judicial District Court, Harris County

APPELLANT'S BRIEF

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for
Civil Litigation

THOMAS A. ALBRIGHT
Chief - General Litigation Division

ANNE MARIE MACKIN
Assistant Attorney General
Texas State Bar No. 24078898

Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone: 512-463-2798
Facsimile: 512-320-0667
anna.mackin@oag.texas.gov

COUNSEL FOR DEFENDANT-APPELLANT

IDENTITY OF PARTIES AND COUNSEL

Defendant-Appellant: Ruth R. Hughs, in her Official Capacity as Secretary of State of the State of Texas

Appellate and Trial Counsel:
Anne Marie Mackin, Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2798
anna.mackin@oag.texas.gov

Plaintiffs-Appellees: Neal Dikeman, Shawn Kelly, Roy Eriksen, Jared Wissel, Scott Ford, Billy Pierce, Christina Ford, Charlie Stevens, and Neko Antonio

Appellate and Trial Counsel:
Katherine S. Youngblood
22915 Three Pines Drive
Hockley, Texas 77447
(281) 255-2744
katherineyoungblood@juryduty.org

Harris County Defendants (nonparties on appeal): Linda Hidalgo, in her official capacity as County Judge of Harris County, and Diane Trautman, in her official Capacity as County Clerk of Harris County

Trial Counsel:
Douglas P. Ray
Rachel Fraser
Assistant County Attorneys
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 274-5163
douglas.ray@cao.hctx.net
rachel.fraser@cao.hctx.net

Appellate Counsel (for Harris County):
Seth Hopkins
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 274-5141
seth.hopkins@cao.hctx.net

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF THE CASE

Nature of the Case	Plaintiffs-Appellees sued for preliminary and permanent injunctive relief against enforcement of Texas Election Code § 141.041 and the Secretary's implementing Advisory under the Texas Constitution and Texas Election Code § 273.081. CR.65-95.
Course of Proceedings	On December 2, 2019, the trial court entered a temporary injunction. CR.146-51. The Secretary timely perfected this accelerated interlocutory appeal, superseding the injunction. CR.155-57. A request to stay the February 18, 2020 trial setting pending outcome of this appeal is pending before this Court.
Trial Court	11th Judicial District Court, Harris County The Honorable Kristen Brauchle Hawkins
Trial Court Disposition	The trial court entered a temporary injunction against Defendants' enforcement of Texas Election Code § 141.041 and the Secretary's implementing Advisory. CR.146-51.

STATEMENT REGARDING ORAL ARGUMENT

Based on a straightforward application of settled law, the temporary injunction should be vacated and this Court should render judgment dismissing Plaintiffs' case on the merits. Given the well-established nature of the applicable law and the impending trial date below, Appellant submits that oral argument is not necessary. Nevertheless, should the Court determine that oral argument would be useful, Appellant respectfully requests the opportunity to participate.

ISSUES PRESENTED

1. Whether the trial court erred in concluding that it had jurisdiction to enter the temporary injunction below against the Secretary.

2. Whether the trial court erred in holding—

    a. that the Advisory implementing Election Code § 141.041 is contrary to the statutory text; and,

    b. that the Constitution forbids Texas from requiring minor-party candidates to show a modicum of support by either submitting a filing fee or a petition in lieu thereof before they are placed on the general-election ballot.

STATEMENT OF FACTS

Plaintiffs contend that they are registered voters in Harris County who have affiliated with or intend to affiliate with the Libertarian Party as candidates, voters, and/or nominating convention delegates. CR.64-69. They challenge Texas Election Code § 141.041, which was signed into law in June 2019 as HB 2504. CR.34-35.[1] The law modified the ballot access framework for small political parties ("minor parties") in two primary ways. First, it lowered the showing of support that a minor party must make to guarantee ballot access for its general-election candidates. CR. 34-35; 46-47. Second, it required minor-party candidates to submit the same filing fee or petition in lieu thereof that is required of major-party candidates. CR. 34-35; 46-47.

Plaintiffs contend that § 141.041 is unconstitutional and that the advisory implementing § 141.041 is contrary to the Texas Election Code. CR.65-35. An overview of Texas's ballot access framework provides context to these allegations.

[1] *See also* Candidates Nominated by Convention, 86th Leg., R.S., ch. 822, § 1, sec. 141.041, 2019 Tex. Sess. Law Serv. 822 (codified at TEX. ELEC. CODE § 141.041).

Political Party Requirements. Political parties organized in Texas nominate general-election candidates through either a primary election (under Texas Election Code Chapter 172) or a nominating convention (under Texas Election Code Chapter 181 or 182). CR.147. The process a party may use depends upon support for the party's nominee for governor in the most recent gubernatorial election. A party whose nominee received at least 20 percent of the total votes in the most recent gubernatorial election *must* nominate its general-election candidates by primary election. TEX. ELEC. CODE § 172.001. A party whose nominee received at least two percent but less than 20 percent of the total votes in the most recent gubernatorial election *may* nominate by primary election, *id.* § 172.002(a), *or* by nominating convention, *id.* § 181.002. A party that did not have a nominee for governor receive at least two percent of the votes in the most recent gubernatorial election *must* nominate by nominating convention. *Id.* § 181.003; CR.34-35; 146-47.

Thus, in order to nominate by primary election and gain access to the ballot, a party will have shown a modicum of support through its gubernatorial candidate. CR.147. A party nominating by convention, however, will not have made this showing, and therefore must

demonstrate a modicum of support by other means in order to guarantee ballot access. CR.147. A party nominating by convention has three options for making this showing, but HB 2504 impacts only one: past performance of the party's candidates for statewide office. TEX. ELEC. CODE § 181.005(c); CR.34-36.[2]

Before 2019, candidates of a party nominating by convention were "guaranteed a place on the general election ballot if, in the most recent general election, the party's nominee for a statewide office received at least five percent of the votes cast for that office." CR.34; TEX. ELEC. CODE § 185.005(c). But

> HB 2504 revised [§] 181.005 to lower the minimum threshold that is required for a party nominating by convention to guarantee its candidates a place on the general election ballot. As amended by HB 2504, [§] 181.005 now provides that a party is entitled to have its nominees placed on the general election ballot automatically, if the party had a nominee for a statewide office receive a number of votes equal to at least *two* percent of the total number of votes for all candidates for that office *at least once in the five previous general elections*.

CR.34 (emphasis added).

[2] A minor party also qualifies for ballot access if its precinct convention participants total at least 1% of the votes cast in Texas's most recent gubernatorial general election. TEX. ELEC. CODE § 181.005(a). Alternatively, a party that does not qualify under § 181.005(a) may submit more signatures which, when added to the convention participants, meet the 1% requirement, thereby qualifying under § 181.006. CR.47.

Candidate Requirements. Individuals seeking a party's nomination must fulfill two requirements, regardless of whether the party nominates by primary election or by nominating convention. They must apply to a designated party official, by the same application deadline. CR.147; TEX. ELEC. CODE §§ 172.021(a) (primary candidate application required), .023 (primary candidate application deadline); 181.031(a) (convention candidate application required), .033 (convention candidate application deadline). And they must either pay a filing fee or submit a petition in lieu thereof. CR.147; TEX. ELEC. CODE §§ 172.024 (primary candidate filing fees), .025 (primary candidate signatures required); 141.041(b) (convention candidate filing fees), (e) (convention candidate signatures required). The amount of the filing fee and the number of signatures required on a petition are the same regardless of whether the individual is seeking nomination by primary or by convention. *Id.*

Advisory. The Election Code does not provide a deadline for individuals seeking nomination by convention to comply with the filing fee/petition requirement. Instead, it provides that the Secretary "shall adopt rules as necessary to implement" § 141.041. TEX. ELEC. CODE §

141.041(f). After § 141.041 was enacted, the Secretary issued an Advisory establishing a compliance deadline of December 9, 2019, for candidates seeking nomination by convention to submit their filing fees or petitions—the same day primary candidates must comply, and the same day both types of candidates must submit their applications. CR.34-36 ("Advisory"); 147-48.

Procedural Background. Plaintiffs argue that Texas Election Code § 141.041 and the Advisory violate the following provisions of the Texas Constitution: "art. 1, § 3 (equal protection); § 3a (equality under the law); § 8 (free speech); § 19 (due process); and § 27 (right of assembly), as well as . . . art. 1, §2 (power inherent in the people) and art. 3, § 56(a) & (b) (no special laws)." CR.75 at ¶30. They also contend that the Advisory violates the Election Code's text. CR.82-84 at ¶¶53-61. Plaintiffs sought temporary and permanent injunctions against enforcement of § 141.041 and the Advisory, naming as Defendants the Secretary, the Harris County Judge, and the Harris County Clerk, in their official capacities. CR.94.[3]

[3] Though counsel for Harris County has appeared in this Court, the Harris County Judge and Harris County Clerk have taken no position in this interlocutory appeal.

The trial court held a two-day hearing on Plaintiffs' temporary injunction request and on December 2, 2019, entered an order granting the same. CR.146-51. The order enjoined Defendants below "from refusing to accept or rejecting applications for nomination from third-party candidates on the grounds that the applicant did not pay a filing fee or submit a petition in lieu thereof at the time of filing or at any other time," and "from refusing to certify third-party nominees for the general-election ballot on the grounds that the nominee did not pay a filing fee or submit a petition in lieu thereof at the time of filing or any other time." CR.150. The order also set this case for trial on the two-week docket starting February 18, 2020. CR.151.

On December 4, 2019, the Secretary filed a notice of accelerated interlocutory appeal. CR.155-56. Because this is an interlocutory appeal from an order granting a temporary injunction, the notice of appeal did not automatically stay the February 18, 2020, trial setting. TEX. CIV. PRAC. & REM. CODE § 51.014(b), (a)(4); CR. 155-56. It did, however, automatically supersede the temporary injunction. *See, e.g.,* TEX. R. APP. P. 29.1(b); TEX. CIV. PRAC. & REM. CODE § 6.001(a); CR.155-56, 170-72, 194-97.

THE LEGAL STANDARD

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). To obtain a temporary injunction, the applicant must plead *and prove* three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.*; *see also Sun Oil Co. v. Whitake*r, 424 S.W.2d 216, 218 (Tex. 1968). Injunctive relief is inappropriate if any of the three elements is absent. *Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc.*, 266 S.W.3d 25, 30 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

This Court will "generally review a district court's grant of a temporary injunction for an abuse of discretion." *Jelinis, LLC v. Hiran*, 557 S.W.3d 159, 165 (Tex. App.—Houston [14th Dist.] 2018, pet. denied), *cert. denied*, 140 S. Ct. 244 (2019) (citations omitted). "The trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts." *Warren v. Aldridge*, 992 S.W.2d 689, 690 (Tex. App.—Houston [14th Dist.] 1999, reh'g overruled) (citation omitted).

Though orders granting or denying temporary injunctions are usually subject to this abuse-of-discretion standard, the Court "will apply a *de novo* standard of review when the issue turns on a pure question of law." *Jelinis, LLC v. Hiran*, 557 S.W.3d at 165. Both subject matter jurisdiction and the scope of a litigant's constitutional rights are questions of law. *See, e.g.*, *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 558 (Tex. 2016) (scope of constitutional rights is a question of law); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (subject matter jurisdiction is a question of law).

SUMMARY OF THE ARGUMENT

The trial court lacked jurisdiction to enter the temporary injunction because Plaintiffs did not plead a valid waiver of the Secretary's sovereign immunity. Indeed, the Uniform Declaratory Judgments Act ("UDJA")—Civil Practice and Remedies Code § 37.004—does not establish jurisdiction, instead providing only for such declaratory relief as is already within a trial court's jurisdiction. Nor does Election Code § 273.081 establish jurisdiction, as it does not waive the Secretary's sovereign immunity. And the Constitution does not establish jurisdiction because Plaintiffs' constitutional claims are not viable.

Settled and straightforward law defeats Plaintiffs' claims on the merits. The district court held that the Advisory violates Texas Election Code § 141.041. But the Advisory merely sets a date for compliance with § 141.041. And § 141.041 is silent as to the deadline for compliance. The trial court therefore erred in finding a conflict.

Plaintiffs' constitutional claims similarly fail. Texas and federal caselaw establish that States have an important interest in requiring those on the ballot to show a significant degree of support before obtaining ballot access. Thus, reasonable ballot-access requirements that

further this end—such as § 141.041—are constitutionally sound. The trial court erred in holding otherwise.

The Court should vacate the temporary injunction order and render judgment dismissing this case.

ARGUMENT

I. The Trial Court Lacked Jurisdiction to Enter the Temporary Injunction Below Against the Secretary.

The State of Texas, its agencies, and its officials have sovereign immunity from suit and liability unless the Legislature has expressly waived that immunity. *See, e.g.*, *Hosner v. De Young*, 1 Tex. 764, 769 (1847); *Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute on other grounds as stated in General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). Sovereign immunity extends not only to suits for money damages, but also to claims that seek to "control state action" through equitable relief. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-56 (Tex. 2002); *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam).

Thus, to establish a trial court's subject matter jurisdiction over claims against a state official such as the Secretary, a plaintiff must allege facts showing that immunity has been waived as to those claims. *E.g.*, *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). The record presents three putative bases for the trial court's jurisdiction over the

Secretary: (1) Civil Practice and Remedies Code § 37.004; (2) Election Code § 273.081; and (3) the Constitution. Each fails.

A. Civil Practice and Remedies Code § 37.004 does not establish jurisdiction.

The trial court concluded that "[b]oth the Civil Practices [sic] and Remedies Code § 37.004 and the Texas Election Code § 273.081 authorize injunctive relief." CR.148. Plaintiffs did not invoke Civil Practice and Remedies Code § 37.004 as a basis for jurisdiction, *see* CR.70, even though they bore the burden to affirmatively demonstrate the court's subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). But even if they had, it would not have given the trial court jurisdiction to enjoin the Secretary.

It is well settled that "the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law" and the UDJA does not enlarge the trial court's jurisdiction. *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d at 620–21. *See also, e.g.*, *Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 114 (Tex. App.–Austin 2007, no pet.) ("The UDJA does not create or augment a trial court's subject-matter jurisdiction—it merely provides a remedy where subject-matter jurisdiction already exists.").

Thus, Civil Practice and Remedies Code § 37.004 would not have established the trial court's jurisdiction, even if Plaintiffs had pled it.

B. Nor does Election Code § 273.081 establish jurisdiction.

The trial court also concluded that "Texas Election Code § 273.081 authorize[s] injunctive relief" in this case. CR.148. Under that Section, "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." TEX. ELEC. CODE § 273.081.

But the Legislature is deemed to have waived immunity by statute only when the waiver is "effected by clear and unambiguous language." TEX. GOV'T CODE § 311.034; *see Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004). Section 273.081 does not "clearly" or "unambiguously" waive the Secretary's immunity. *Cf. Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 177 (Tex. App.–Austin 2013, no pet.) (explaining that "statute that merely permits state to 'sue or be sued'" was not clear and unambiguous statute sufficient to waive sovereign immunity). As a result, § 273.081 does not establish the trial court's jurisdiction over the Secretary. *See also, e.g., Wichita Falls State*

Hosp. v. Taylor, 106 S.W.3d 692, 695 (Tex. 2003) (noting that the State may relinquish its sovereign immunity, if at all, in "varying degrees," and the legislature "is better suited to balance the conflicting policy issues associated with waiving immunity.")

C. Because they are not viable, Plaintiffs' constitutional claims similarly fail to establish jurisdiction.

Plaintiffs also assert that the Texas Constitution creates jurisdiction because their constitutional rights have been violated. "While it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, immunity from suit is not waived if the constitutional claims are facially invalid." *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009); *Andrade v. NAACP of Austin,* 345 S.W.3d 1, 11 (Tex. 2011)). Thus, "the Secretary retains immunity from suit unless the [Plaintiffs] have pleaded a viable claim." *Andrade v. NAACP of Austin*, 345 S.W.3d at 11 (citing, *inter alia*, TEX. CONST. art. I, § 3).

For the reasons below, the trial court erred in finding that Plaintiffs asserted a cognizable constitutional injury. *See infra*, part II. Thus, Plaintiffs' constitutional claims are not viable and, consequently, do not

establish jurisdiction over the Secretary. *E.g.*, *Andrade*, 345 S.W.3d at 7; *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d at 13.

II. The Trial Court Erred by Concluding that Plaintiffs Had Shown a Probable Right of Recovery.

The trial court entered a temporary injunction based upon its findings that "§ 141.041 is an actual or threatened violation of the Texas and United States Constitutions," "that the Advisory implicates Plaintiffs' basic constitutional rights guaranteed by both the Texas and United States Constitutions, including their right to freedom of association," and that "the Advisory violates the Texas Elections [sic] Code." CR.147-48. As legal determinations, these conclusions should be reviewed *de novo*,[4] but they should be vacated even if reviewed for an abuse of discretion. *See, e.g., Warren v. Aldridge*, 992 S.W.2d at 690.

A. The trial court erred in finding that the Advisory violates the Texas Election Code.

Even if § 273.081 waived the Secretary's immunity (it does not), the trial court abused its discretion in concluding that the Advisory violates Election Code § 141.041's text. That law says:

> to be eligible to be placed on the ballot for the general election for state and county officers, a candidate who is nominated by

[4] *E.g.*, *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d at 558.

> convention under Chapter 181 or 182 must: (1) pay a filing fee to the secretary of state for a statewide or district office or the county judge for a county or precinct office; or (2) submit . . . a petition in lieu of a filing fee . . . .

TEX. ELEC. CODE § 141.041(a). Nothing in that text is inconsistent with requiring submission of the filing fee or petition by December 9, 2019. CR.34-36. The statute says nothing about when a candidate must satisfy these statutory eligibility requirements. In fact, it expressly delegates authority to the Secretary to make such determinations, providing that she "shall adopt rules as necessary to implement this section." TEX. ELEC. CODE § 141.041(f).

The Advisory is entirely consistent with the existing filing fee/petition process for primary candidates. In fact, reading § 141.041 in the context of the entire Code—as we must—it becomes clear that the existing framework is not compatible with any other interpretation.

Whether nominated by primary or convention, party candidates must submit an application to party officials by the second Monday in December. TEX. ELEC. CODE §§ 172.023, 181.033. After candidates submit an application and filing fee or petition, parties conduct their respective primary elections and nominating conventions, and party officials must certify their nominees to the Secretary within 20 days of receiving the

results. *Id.* §§ 172.028, .029, .122 (major parties certify within 20 days after canvass); 181.068 (minor parties certify within 20 days after convention). After parties certify their candidates, there is a replacement process for candidates who die or are declared ineligible. *Id.* § 145.036. Then—by the 68th day before election—the Secretary certifies candidates to county election officials for placement on the ballot. *Id.* § 161.008.

By requiring minor-party candidates to submit a filing fee or petition at the beginning of the process—just as major-party candidates must do—the Advisory ensures that § 141.041 operates seamlessly within the existing statutory framework. The Election Code sets no deadline for candidates nominated by convention to submit a fee/petition after the convention, and it establishes no enforcement mechanism for those who fail to do so. Without the deadline the Advisory provides, minor parties might be unable to, for example, identify a replacement candidate in the event of death or ineligibility. *See* TEX. ELEC. CODE § 145.031, *et seq*. The Advisory avoids these problems by interpreting § 141.041 to require minor-party candidates to submit their filing fee or petition at

the same time they submit their application, just as major-party candidates must. *Id.* §§ 172.021; 181.032, .033.

B. The trial court erred in finding a violation of the United States Constitution.

1. *Anderson/Burdick* Standard

Despite the importance of voting, the ability to "vote in any manner and the right to associate for political purposes through the ballot," is "not absolute." *Tex. lndep. Party v. Kirk,* 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi,* 504 U.S. 428, 433 (1992)). States have substantial authority to regulate elections "to ensure fairness, honesty, and order." *Id.* (citing *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). Texas has exercised that authority by enacting ballot-access laws, including § 141.041.

Under the United States Constitution, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Tex. Indep. Party v. Kirk*, 84 F.3d at 182 (citing *Burdick v. Takushi*, 504 U.S. at 434; *Anderson v. Celebrezze,* 460 U.S. at 789). Under this "*Anderson/Burdick*" standard,

"[t]he rigorousness of the inquiry into the propriety of the state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights." *Id.* (citing *Burdick,* 504 U.S. at 434). Provisions that impose "severe restrictions" must be "narrowly drawn" and support "compelling" state interests, whereas "reasonable, nondiscriminatory restrictions" require only "important regulatory interests" to pass constitutional muster." *Burdick,* 504 U.S. at 434.

2. Texas has an undisputed interest in requiring a preliminary showing of support for candidates placed on the ballot.

The United States Supreme Court has long recognized the "important state interest in requiring some preliminary showing of a significant modicum of support" for those on the ballot and "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Accordingly, it has recognized that "States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (quotation marks and citation omitted). Texas is not required "to make a particularized showing of the existence

of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Id.* at 194-95. *See also, e.g., Burdick,* 504 U.S. at 434 (noting the state's "important regulatory interests" in streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion).

Reflecting the State's important interests, Texas's ballot-access requirements have repeatedly been upheld, even as they have evolved. For example, in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) the Supreme Court upheld the requirement that major parties nominate by primary and minor parties nominate by convention, stating, "[i]t is too plain for argument" that the State "may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. 767, 781 (1974) (citing *Storer v. Brown*, 415 U.S. 724, 733-36 (1974)). "Neither can we take seriously," the Court continued, "the suggestion . . . that the State has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election." *Id.* In this vein, the Court noted that a "major party, in addition to the elections,

must also hold its precinct, county, and state conventions to adopt and promulgate party platforms and to conduct other business." *Id.*

The United States Court of Appeals for the Fifth Circuit reiterated this conclusion in *Texas Independent Party v. Kirk*, 84 F.3d at 185 ("The Supreme Court has already examined the framework of the Texas electoral scheme and held that requiring minor political parties to nominate candidates through a convention process is constitutionally permissible.") (citing *White*, 415 U.S. at 780-81). *Kirk* also rejected the argument that there is "any undue burden occasioned by requiring candidates to decide to seek public office more than a year in advance of the general election and two months prior to the primary." *Id.* at 184. "In the context of a nondiscriminatory deadline that applies to all parties and candidates," the Fifth Circuit concluded, "we see little burden from the declaration requirement." *Id.* Finally, *Kirk* rejected the argument that shortening the time minor parties had to petition for ballot access imposed an unconstitutional burden, stating, "[r]equiring minor parties and independent candidates to meet constitutional petitioning requirements at an earlier stage is not a severe burden." *Id.* at 186.

3. Section 141.041 is tailored to Texas's interests.

Section 141.041 satisfies *Anderson/Burdick* balancing for the same reasons that prior versions of the Texas Election Code did: It furthers Texas's "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Munro v. Socialist Workers Party*, 479 U.S. at 194 (quotation marks and citation omitted). It is eminently reasonable to require candidates to show a modicum of support in order to have their names on the ballot, particularly when HB 2504 reduced the threshold for a minor party to secure ballot access for its candidates. And it is sensible to require this showing at the same time it is required of major-party candidates. Indeed, this facilitates the Secretary's ability to efficiently complete the certification process after the nominating conventions and allows minor parties to avail themselves of the replacement process for candidates who die or become ineligible. *See, e.g.,* TEX. ELEC. CODE §§ 181.068, .007; 145.036. And in any event, it is exactly what is required of major-party candidates. *See, e.g.*, *Texas Indep. Party v. Kirk*, 84 F.3d at

184-86 (rejecting notion that "nondiscriminatory deadline that applies to all parties and candidates" was unconstitutional).

Moreover, the filing fee or signatures required is proportional to the support required to win the office for which the candidate wants to run. *See, e.g.,* TEX. ELEC. CODE §§ 172.024, .025; 141.041(b), (e). This is the very definition of tailoring, and similar requirements have been upheld by courts nationwide. *See, e.g.*, *Jenness*, 403 U.S. at 442; *Storer v. Brown*, 415 U.S. 724, 740 (1974); *De La Fuente v. Padilla*, 930 F.3d 1101, 1106-07 (9th Cir. 2019); *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010).

Plaintiffs' argument that § 141.041 impermissibly requires nominees to "pay to be on the general election ballot," CR.74, misstates the record and misunderstands the law. First, § 141.041 does not require payment; it requires *either* a filing fee *or* a nominating petition. *See* TEX. ELEC. CODE § 141.041. Second, its requirements are permissible. They further Texas's important interests—including its interest in limiting the ballot to serious candidates who demonstrate some level of public support.

Supreme Court precedent endorses this type of alternative qualification requirement, including for litigants similarly situated to the

Plaintiffs. For example, in *Bullock v. Carter*, the United States Supreme Court concluded that a state violated the Equal Protection Clause of the U.S. Constitution by "providing *no reasonable alternative* means of access to the ballot" other than paying a filing fee—a fact which was "critical to [the Court's] determination of constitutional invalidity." 405 U.S. at 149 (emphasis added). Such a system is unconstitutional, the Court concluded, because candidates could be "precluded from seeking the nomination of their chosen party, no matter how qualified they might be, *and no matter how broad or enthusiastic their popular support*." *Id.* at 143 (emphasis added).[5] This stands in stark contrast to Texas's system, which provides the petition alternative for candidates who are qualified and have a modicum of popular support but lack financial resources.

Because the temporary injunction entered below departs from the caselaw just discussed, it should be vacated. In fact, on November 25, 2019, the United States District Court for the Western District of Texas denied a motion to preliminarily enjoin enforcement of § 141.041 for the

[5] *Cf. Lubin v. Panish*, 415 U.S. 709, 716—17 (1974) (Holding that conditioning ballot access upon payment of a filing fee was impermissible, but that providing a petition alternative satisfies constitutional muster; noting, "[a] large filing fee may serve the legitimate function of keeping ballots manageable," but "the process of qualifying candidates for a place on the ballot may not constitutionally be measured *solely* in dollars") (emphasis added).

2020 election cycle. *Miller, et al. v. Doe, et al.*, No. 1:19-cv-00700-RP, ECF No. 30 (W.D. Tex.—Austin Div.) (25 Nov. 2019); 4 Appx.[6] In doing so, the court rejected arguments that § 141.041 and the Advisory violate due process,[7] and that § 141.041 and the Advisory violate voting, speech and associational rights as applied to Libertarian and Green party members, candidates, and voters.[8] This emphasizes that the district court below erred in finding that this same framework violates these same provisions of the US Constitution. *E.g.*, *Warren v. Aldridge*, 992 S.W.2d at 690.

The federal court also rejected the argument that the Advisory violates Election Code § 141.041's text,[9] which underscores what the text

[6] Appendix citations refer to the Appendix filed with the Secretary's Rule 29.3 Motion for Temporary Relief.

[7] 4 Appx. at *17-19 (Holding that declarations that "[§] 141.041 places a potentially insurmountable obstacle in front of [Libertarian Party and Green Party] candidates who now must comply, without sufficient notice . . . failed to meet their burden of showing a likelihood of success on their allegations of due process violations.")

[8] 4 Appx. at *19, 1*9-20.

[9] 4 Appx. at *16 (Noting that § 141.041 "expressly delegates authority to [the Secretary] to 'adopt rules as necessary to implement this section'" and that "the statute is silent on the timing of the filing deadline;" concluding that the Advisory "does not contradict the statute, and the construction conforms the implementation of new [§] 141.041 with already-existing statutes and rules that set the same deadline.") (citations omitted).

itself makes plain—that the Advisory is fully consistent with the statute it implements. *See supra*, Part II(A).

The federal court correctly denied the same relief that Plaintiffs seek from this Court: a preliminary injunction against enforcement of § 141.041 under the Constitution or, alternatively, as inconsistent with the Election Code's text. Nothing supports a different result here.

C. The trial court similarly erred in finding a violation of the Texas Constitution.

In addition to the provisions of the United States Constitution at issue in *Miller*, Plaintiffs invoked Texas Constitution article I, Sections 2 (power inherent in people), 3 (equal protection), 3a (equality under the law), 8 (free speech), 19 (due process), and 27 (assembly) as well as article 3, section 56 (no special laws). CR. 75 at ¶30. The trial court's order specifically found a violation of "the freedom of association." CR.148-49.

Protections under the Texas Constitution are generally regarded as coterminous with their federal analogs unless a broader protection is evident from "the text, history, and purpose of" the Texas Constitution. *E.g., Operation Rescue—Nat'l v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 975 S.W.2d 546, 559 (Tex. 1998). There is no evidence, argument, or authority in the record to support a finding that

the Texas Constitution's equal protection/equality under the law,[10] free speech,[11] due process,[12] or assembly[13] protections are any broader than their federal counterparts as relevant here. And where a plaintiff "cite[s] authority only under the U.S. Constitution," reviewing courts "do not consider the extent to which [the Texas Constitution] provides an independent basis for protection." *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 at n.4 (Tex. 1998) (citing *Tilton v. Moye*, 869 S.W.2d 955, 956, n.2 (Tex. 1994)).

Plaintiffs' claims under the Texas Constitution fail for the same reasons their claims under the federal Constitution fail: because the same *Anderson/Burdick* analysis applies. Indeed, "[t]o decide a

---

[10] *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002) ("the federal analytical approach applies to equal protection challenges under the Texas Constitution.")

[11] *Democracy Coal. v. City of Austin*, 141 S.W.3d 282, 297 (Tex. App.–Austin 2004, no pet.) ("[U]nless a party can show through the text, history, and purpose of article I, section 8, that the state constitution affords more protections than the First Amendment in regard to that case, courts should assume that free speech protections are the same under both constitutions.")

[12] *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) ("While the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction.")

[13] *See generally Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 WL 6336186, at *12 (Tex. App.—Austin Nov. 27, 2019, no pet. h.) (characterizing *Bell v. Hill*, 74 S.W.2d 113, 119–20 (1934), as "recognizing that citizens' right to form political associations is protected by the U.S. Constitution's First Amendment and by Texas Constitution's assembly clause").

constitutional challenge to an election statute," this Court "must consider the character and magnitude of the asserted injury to the rights protected by the constitution, identify and evaluate the State's interests for the burden imposed, and determine the legitimacy and strength of those interests and whether those interests necessitate the burden on a party's rights." *Risner v. Harris Cty. Republican Party*, 444 S.W.3d 327, 338 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Anderson*, 460 U.S. at 789).

Because this is the same standard as the federal Constitution, it yields the same result that federal courts have reached. For example, *Risner* rejected a challenge to Election Code § 172.021(e)'s requirement that certain justice of the peace candidates collect 250 signatures to be entitled to a place on the primary-election ballot. 444 S.W.3d at 338. The First Court of Appeals employed reasoning similar to that of the federal courts discussed above:

> Candidacy for an elected position is not a fundamental right, and the requirement that a candidate for the office of justice of the peace in a county with a population of more than 1.5 million obtain 250 signatures to be entitled to a place on the general primary election ballot does not impose a significant burden on a person's right to run for office.

> Nor does such a requirement interfere with a fundamental right or discriminate against a subject class, as it applies equally to all persons, regardless of political party, in counties with populations greater than 1.5 million. And, because "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates," the statute is rationally related to a legitimate state interest in preventing or discouraging an unqualified or frivolous candidate from obtaining a place on the ballot.

Id. (citing *Anderson*, 460 U.S. at 788-89 & n.9; *State v. Hodges*, 92 S.W.3d 489, 498 (Tex. 2002) (holding candidacy is not fundamental right); *Walker v. State*, 222 S.W.3d 707, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd)). For these same reasons, § 141.041 is likewise rationally related to Texas's interests here. *Id.*

Plaintiffs' case also fails to the extent that it relies upon Texas constitutional provisions without federal analogs, specifically article 1, section 2 and article 3, section 56. Those provisions provide no basis for the temporary injunction below.

Article 1, section 2 stands for the relatively unremarkable proposition that Texas's government derives its power from Texans. It provides:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

TEX. CONST. art. 1, § 2. Nothing in this text purports to limit the State's authority to enact reasonable ballot-access restrictions, and there is no authority construing it to do so.

Article 3, section 56 is similarly far afield, providing that "[t]he Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing for the opening and conducting of elections, or fixing or changing the places of voting." TEX. CONST. art. 3, § 56(a)(12). This section further states, "[i]n addition to those laws described by Subsection (a) of this section in all other cases where a general law can be made applicable, no local or special law shall be enacted," with exceptions not relevant here. TEX. CONST. art. 3, § 56(b).

"A 'special law' is a statute that 'relates to particular persons or things of a class,' rather than the class as a whole." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 188 (Tex. 2010) (citations omitted); *see also Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 456 (Tex. 2000) (defining

"special law" as one that "impermissibly distinguishes between groups on some basis other than geography") (*citing Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997)). "The primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class." *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (citation omitted).[14]

Plainly, Texas Election Code § 141.041 is not a special law; it relates to the entire "class" of candidates seeking nomination by convention. *Cf. Robinson v. Hill*, 507 S.W.2d 521, 526 (Tex. 1974) (upholding special bail bond regulations for counties with populations over 150,000 because "the Legislature in this instance may well have concluded that bail bondsmen in the more populous counties should be regulated . . . but that the same safeguards and procedures were not necessary . . . in more sparsely populated areas.") And it treats those candidates *the same* as all other candidates seeking a party's nomination. Moreover, for the reasons

[14] *See also, e.g.*, *Owens Corning v. Carter*, 997 S.W.2d 560, 583 (Tex. 1999) ("Legislation does not violate Article 3, Section 56 as long as there is a reasonable basis for its classifications.")

explained above, the requirements are tailored to the State's interests, and reasonable in light of the same. *See supra*, Parts II(B) & (C).

PRAYER

The Secretary respectfully requests that the Court enter an order vacating the temporary injunction below and render judgment dismissing this case.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2798 | FAX: (512) 320-0667
anna.mackin@oag.texas.gov

ATTORNEYS FOR DEFENDANT-APPELLANT SECRETARY OF STATE

CERTIFICATE OF SERVICE

I certify that on January 6, 2020, in compliance with Texas Rule of Appellate Procedure 9.5, this document was served electronically on counsel listed below through the electronic filing manager:

Katherine S. Youngblood
22915 Three Pines Drive
Hockley, Texas 77447
(281) 255-2744
katherineyoungblood@juryduty.org

COUNSEL FOR PLAINTIFFS-APPELLEES

Douglas P. Ray
Rachel Fraser
Seth Hopkins
Assistant County Attorneys
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 274-5141
douglas.ray@cao.hctx.net
rachel.fraser@cao.hctx.net
seth.hopkins@cao.hctx.net

COUNSEL FOR HARRIS COUNTY AND HARRIS COUNTY DEFENDANTS

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this document complies with Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface font no smaller than 14-point for text and 12-point for footnotes. This document also complies with Texas Rule of Appellate Procedure 9.4(i) because it contains 6,301 words, according to Microsoft Word, excluding parts exempted by Rule 9.4(i)(1).

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General